IN THE

Supreme Court of the United States

October Term, 1939.

No. 638.

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Petitioner,

v.

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA, BRANCH NO. 1, LOCAL NO. 706,
Respondents.

BRIEF FOR PETITIONER.

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Respondents.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania was filed April 24, 1939, and has not been officially reported. It appears in the record at page 1389.

The opinion of the Circuit Court of Appeals for the Third Circuit was filed November 29, 1939, and is reported in 108 F. (2d) 71. It appears in the record at page 1399.

GROUND FOR JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. Sec. 347 (a)).

STATEMENT OF THE CASE.

The controlling issue involved in the present case is whether the actions of the respondents constitute a restraint of commerce in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. Sec. 1 (hereinafter referred to as the Sherman Act).

This suit was instituted by the Apex Hosiery Company, petitioner (hereinafter referred to as Apex) against the American Federation of Hosiery Workers, Branch No. 1, Philadelphia, a labor union (hereinafter referred to as Union), and its officers, to recover the damages Apex sustained to its plant, machinery and business as a result of the defendants' violation of the Sherman Act, under the following set of facts:

Apex is the second largest hosiery concern in the country (R. 101), its factory being located in Philadelphia, Pennsylvania, where it employs over 2500 persons (R. 252), and does an annual business of $5,000,000. Its principal raw materials are silk, which it receives from Japan (R. 148) and cotton, which it receives from the South (R. 148). More than 80 per cent. of its sales and shipments of finished merchandise are interstate (R. 109).

Apex operated a non-union shop (R. 110), but at all times collectively bargained with its employees on questions of hours, wages and conditions of work (R. 110). Prior to May 6, 1937, there had been no controversy between employees and management (R. 123). No complaint was ever filed with either the State or National Labor Relations Board, by either the Union or any employee of Apex (R. 122).

In April of 1937, *when the Union had only eight members among the 2500 employees of Apex* (R. 735), it sent a

letter to Apex demanding a closed shop union agreement (R. 121), the execution of which would have been illegal under Sections 8 (3) and 9 (a) of the National Labor Relations Act, since the Union was not the chosen representative of a majority of the Apex employees. From then until May 6, 1937, no discussion with Apex of the terms of such an agreement was sought by the Union (R. 121).

On May 6, 1937, when the Union's membership in the Apex plant was still only eight out of 2500 (R. 735, 1400), the Union organized a demonstration, ordering out for that purpose union members of other hosiery mills (R. 82, 90, 94), with the result that early in the afternoon a mob of more than 15,000 persons gathered outside the Apex plant (R. 260). At about 2:30 P. M., William Leader, president of the Union, stood at the head of this mob at the closed front door of the Apex mill, and demanded to see its president (R. 183). Leader was informed that the president of Apex would not confer with him while a mob of people was outside the mill, but that he would confer with him at his attorney's office (R. 127). Thereupon, amid pounding on the front door of the mill (R. 128), Leader exclaimed: "I announce a strike at the Apex Hosiery Company and you can rest assured before the day is out, there will be a sit-down strike, and it will not reopen until it opens as a closed shop" (R. 184).

Immediately following this announcement, a barrage of missiles, iron bars and clubs shattered the plant windows, and through them a company of raiders was bodily thrown into the plant (R. 128); the front door was crashed in and a mob of thousands stormed into the mill (R. 261). Office partitions, records, desks, typewriters, adding machines and filing cabinets were destroyed (R. 128, 193). The president

of Apex was hit by a stone and struck in the back of the neck by an inkwell (R. 128). The general manager of Apex was beaten by members of the mob (R. 262). An elevator operator was struck on the head with an iron pipe, knocked down, and kicked in the face, resulting in, among other injuries, a fractured jaw, necessitating three weeks hospitalization (R. 198, 199). Another employee was so beaten that he sustained five broken ribs and required two and one-half weeks of hospitalization (R. 203).

While the plant was thus being laid waste by the mob, respondent Leader, accompanied by the Union's attorney and a committee of its members, came into the office of the president of the company and demanded, "Now, are you ready to sign this agreement?" (R. 129.) The president replied that he would not sign under such conditions (R. 129). Thereupon, Leader went into the wareroom and organized the sit-downers who were to hold possession of the plant. Standing upon a table, Leader addressed several hundred persons gathered about him (R. 222), instructing them that they were to be the sit-downers (R. 222); that the Union would not permit them to leave the plant until Apex signed a closed shop agreement (R. 223); that the Union would take care of them and supply them with cots, blankets and food (R. 223); that they should organize and appoint a chairman, and that it was just the same as if they were in the army (R. 223). Meanwhile, members of the group passed out "pledge cards" which they forced everyone to sign (R. 227), by which the signer pledged himself to go on a sit-down strike at Apex until the company signed a closed shop agreement (R. 229). Later in the day, while Leader was still on the premises, food, cots and blankets were brought into the mill by the Union for the sit-downers (R. 227, 228).

Thereupon, the sit-downers organized themselves, elected a chairman and set up various committees (R. 769). The next day all locks on all gates and entrances to the mill were changed. Only the sit-downers were given keys, no one being allowed to enter or leave the mill without their permission (R. 313, 410, 787). During the entire period the sit-downers were in possession of the Apex plant, the Union paid them strike benefits (R. 332, 339-354), supplied them with food from the Union's central strike kitchen (R. 359), and furnished them medical care (R. 360).

The sit-downers forcibly maintained exclusive possession of the Apex mill from May 6, 1937 until June 23, 1937, when they were evicted by order of the Circuit Court of Appeals for the Third Circuit in an injunction proceeding based on the respondent Union's violation of the Sherman Act (APEX HOSIERY CO. v. LEADER, 90 F. (2d) 155 (1937)). During the period of their occupancy of the Apex mill, the sit-downers damaged and wrecked a total of 134 legging and footing machines, 30 machines being wrecked on June 10th (R. 421), and 104 machines on June 22d (R. 440, 445-457), which was the day after the Circuit Court of Appeals, by injunctive decree, had ordered the sit-downers out of the plant. In addition, there was extensive damage to other property and equipment of the Company.

On May 6, 1937, when its plant was seized by respondents, Apex had on hand approximately 130,000 dozens of hosiery (R. 518, 519) valued at approximately $800,000 (R. 150, 151) ready for shipment against unfilled orders (R. 519), 80 per cent. of which were to be shipped to customers outside of Pennsylvania (R. 522). During the sit-down, Apex on three different occasions specifically requested the Union's permission to remove this finished merchandise for

shipment against orders on hand (R. 618-621), but the Union's reply, through its president, William Leader, was that not one dozen pairs of hose could be shipped until a closed shop agreement was signed (R. 620). All the negotiations and conferences with Apex during the sit-down strike were reported back by the union officers to the general union membership (R. 403, 404).

As a result of the wreckage to the company's machinery and equipment, the plant was unable to resume even partial operations until August 19, 1937 (R. 271), and it was not until November 1, 1937, that its normal operations could again be resumed (R. 271).

The case was tried before Judge Kirkpatrick and a jury. At the trial petitioner agreed to limit any recovery to the general funds of the Union by voluntarily waiving a verdict against the individual members of the Union and execution process against their individual property (R. 1306). On April 3, 1939, the jury returned a general verdict for the plaintiff (petitioner) against the Union and its president, Leader (respondents) in the sum of $237,310.85, which sum was fully itemized by the jury in answers to 17 written interrogatories given them by the trial judge (R. 1363-1367). The trial judge then trebled this verdict to $711,932.55 in accordance with the provisions of the Sherman Act as amended by Section 4 of the Clayton Act (Act of 1914, c. 323, 38 Stat. 731, 15 U. S. C. A. Sec. 15).

Thereupon the present respondents filed an appeal with the Circuit Court of Appeals for the Third Circuit, which, on November 29, 1939, reversed the judgment of the lower court on the ground that the above facts did not establish a violation of the Sherman Act (108 Fed. (2d) 71). In so holding, the Circuit Court overruled its own

previous decision rendered on June 21, 1937 (90 Fed. (2d) 155) in the injunction proceedings instituted by Apex to oust the sit-downers, when the Circuit Court held that these same facts did establish respondents' violation of the Sherman Act.

A Petition for Rehearing filed with the Circuit Court of Appeals was denied on December 27, 1939.

On January 12, 1940, petitioner filed its Petition in this Court for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit, which Petition, on February 26, 1940, was granted.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that respondents' violent and forcible stoppage of petitioner's manufacturing and interstate shipping operations by the unlawful seizure and occupation of petitioner's plant had only an indirect and remote effect on interstate commerce, and that therefore the Sherman Act was not violated.

2. In holding that the record did not support the jury's finding that respondents intended to restrain commerce, and that therefore the Sherman Act was not violated.

3. In holding that the Sherman Act was not violated by respondents because an unreasonably great volume of commerce was not restrained by their conspiracy.

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT.

Petitioner instituted this action against respondents under the Sherman Act to recover the damages sustained when respondents, pursuant to a conspiracy, forcibly invaded, seized and held exclusive possession of petitioner's plant for a period of seven weeks, and deliberately wrecked its machinery and equipment, thereby completely stopping and preventing its manufacturing and interstate shipping operations. Petitioner contends that respondents' conspiracy violated the Sherman Act because:

1. Respondents' complete stoppage of petitioner's manufacturing and interstate shipping operations, totalling $5,000,000. per year, constituted a direct burden upon and restraint of commerce under the decisions of this Court.

2. Respondents' forcible prevention of petitioner's removal and interstate shipment of $800,000. of finished merchandise on hand constituted a direct restraint of commerce under the decisions of this Court.

3. Respondents' conspiracy was carried out with the proved intent of restraining interstate commerce. The Circuit Court erred when it held that there was no evidence of such intent because respondents' sole "intent" was to secure a closed shop. In so holding, the Circuit Court confused "intent" with ultimate "purpose" or "object" of respondents' conspiracy.

4. The necessary consequence of respondents' unlawful acts was to restrain commerce and therefore even had there not been ample proof of actual intent to restrain commerce, such an intent would be presumed as a matter of law.

Therefore, respondents' conspiracy having restrained commerce in violation of the Sherman Act, the Circuit Court erred in reversing the judgment entered for the petitioner in the District Court.

ARGUMENT.

I. INTRODUCTION.

The Rights of Labor Will in No Way Be Impaired or Destroyed by a Decision That the Sherman Act Was Violated in This Case.

Respondents contended in the Courts below that the rights of labor, including the right to strike, will be impaired or destroyed by a determination that the Sherman Act has been violated in the present case. Any such attempt by respondents to pose as the protector of the rights of labor is for the sole purpose of escaping the consequences of their own wilful violation of the Sherman Act.

Employees have the right to stop work, strike, peacefully picket and to persuade others to do likewise, in order to enforce their demands. These are labor's lawful means of exercising pressure upon employers to attain the objectives of labor, and even should these lawful acts result in a restraint of commerce, they are expressly exempted from the operation of the Sherman Act by Sections 6 and 20 of the Clayton Act.*

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* Sec. 6 of the Clayton Act (Act of 1914, c. 323, Sec. 6, 38 Stat. 731, 15 U. S. C. A. Sec. 17) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from *lawfully* carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

Sec. 20 of the Clayton Act (Act of 1914, c. 323, Sec.

However, the record facts set forth in the "Statement of the Case" show conclusively that in the present case there never was a "strike" in the accepted sense. When respondent union found itself unable, prior to May 6, 1937,

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20, 38 Stat. 738, 29 U. S. C. A. Sec. 52) provides:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by *peaceful* means so to do; or from attending at any place where any such person or persons may *lawfully* be, for the purpose of *peacefully* obtaining or communicating information, or from *peacefully* persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by *peaceful* and *lawful* means so to do; or from paying or giving to, or withholding from any person engaged in such dispute, any strike benefits or other moneys or things of value; or from *peaceably* assembling in a *lawful* manner, and for *lawful* purposes; *or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" (Italics ours.)

to enroll more than 8 members among the 2500 Apex employees (R. 735), desiring to circumvent the delay which would have ensued if *lawful* means of unionization were adopted, it determined to enforce its demands by deliberately invading, seizing and holding exclusive possession of the Apex mill, and demolishing its property, machinery and equipment. These acts of violence and destruction were not the spontaneous, sporadic acts sometimes known to follow provocation or incitation in bitterly waged labor disputes, such as skirmishes between striking and non-striking employees or between strikers and police. They were the deliberately conceived and flagrantly unlawful actions of a group which deemed itself above the law.

Respondents' unlawful conduct was well characterized by the Circuit Court, in the present case, in these words (R. 1401):

> "During the course of the sit-down strike machinery was wantonly demolished or damaged to the extent of many thousands of dollars. The usurpation of the company's rights in its own property and the demolition of machinery and equipment, were conducted without interference by those local authorities charged with enforcing law and order in the City of Philadelphia. These facts which are not open to dispute show the existence of the sit-down strike in its most aggravated and illegal form. Judicial condemnation of such tactics cannot be too severe. They serve the cause of labor badly indeed and the public good fares worse before such a display of lawlessness."

This Court, while fully recognizing labor's right to strike, has nevertheless unequivocally stated that this right contemplates the conduct of a strike *by lawful means*. In the recent case of NATIONAL LABOR RELATIONS BOARD v. FAN-

STEEL METALLURGICAL CORP., 306 U. S. 240, 83 L. ed. 627 (1939), which also involved a sit-down strike, violence and illegal plant seizure, Mr. Chief Justice Hughes, in speaking for this Court, said (page 253):

> "The employees had the right to strike *but they had no license to commit acts of violence or to seize their employer's plant.* We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. *To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.*" (Italics ours.)

And again at page 256:

> "Congress also recognized the right to strike,—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act 'shall be construed so as to interfere with or impede or diminish in any way the right to strike'. *But this recognition of 'the right to strike' plainly contemplates a lawful strike,*—the exercise of the unquestioned right to quit work. . . ."
>
> "*Here the strike was illegal in its inception and prosecution.* As the Board found, it was initiated by the decision of the Union committee 'to take over and

hold two of the respondent's "key" buildings.' It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of 'the right to strike' to which the Act referred. *It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit.*" (Italics ours.)

So too in the present case, respondents chose to substitute for their lawful right to strike, the outrageous acts of violence, property destruction and plant seizure, of which they stand condemned. By this choice they surrendered the immunity from the Sherman Act which the Clayton Act grants to labor organizations provided they engage in *lawful* activities.

Therefore the rights of labor will in no way be impaired or destroyed by a decision that respondents have violated the Sherman Act, unless these rights are held to include the right of a union forcibly to invade and retain exclusive possession of a manufacturing plant, wantonly to destroy its machinery and equipment, and to block the flow of interstate commerce in order to enforce its demands for a closed shop at a time when it had but 8 members among 2500 employees.

II. SCOPE OF THE SHERMAN ACT.

Section 1 of the Sherman Act (Act of 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. Sec. 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The Sherman Act was enacted by Congress as a regulation of "commerce among the several States" under the power given it by the commerce clause of the Constitution (Article 1, Section 8, Clause 3), which provides:

> "The Congress shall have Power . . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

There are no words in the Sherman Act limiting the field or scope of interstate commerce to which it is meant to apply. Its language is as broad as the Constitutional provision quoted above.

Despite the fact that during the past 50 years since the Sherman Act was enacted, it has constantly been contended that labor unions are not subject to its provisions, the Act has never been so limited in its interpretation. It has long been firmly established by the decisions of this Court *without a single dissent*, that labor organizations are subject to the Act, when, pursuant to a conspiracy, they engage in *unlawful* activities which restrain or obstruct the free flow of interstate commerce. Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488 (1908); Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. ed. 797 (1911); Lawlor v. Loewe, 235 U. S. 522, 59 L. ed. 341 (1915); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. ed. 349 (1921); American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 66 L. ed. 189 (1921); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 69 L. ed. 963 (1925); United States v. Brims, 272 U. S. 549, 71 L. ed. 493 (1926); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 71 L. ed. 916 (1927); Local 167 v. United States, 291 U. S. 293, 78 L. ed. 804 (1934).

III. RESPONDENTS' CONSPIRACY VIOLATED THE SHERMAN ACT.

The Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce. The existence of respondents' conspiracy in the case at bar was conclusively proved to and found by the jury, and neither the respondents nor the Circuit Court have questioned this finding.

Therefore, the only question remaining for determination in the present case is whether respondents' conspiracy restrained commerce. In construing the Sherman Act, this Court has held that there is a restraint of commerce in violation of the Act:

1. When the conspiracy *directly* affects commerce.

   BEDFORD CUT STONE COMPANY v. JOURNEYMEN STONE CUTTERS' ASSN., 274 U. S. 37, 71 L. ed. 916 (1927);

   DUPLEX PRINTING PRESS CO. v. DEERING, 254 U. S. 443, 65 L. ed. 349 (1921);

   LOEWE v. LAWLOR, 208 U. S. 274, 52 L. ed. 488 (1908);

   NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP., 301 U. S. 1, 81 L. ed. 893 (1937) at 39.

2. When the conspirators *intended* to restrain commerce, even if ordinarily the conspirators' acts affected commerce only indirectly.

   CORONADO COAL CO. v. UNITED MINE WORKERS, 268 U. S. 295, 69 L. ed. 963 (1925);

   A. L. A. SCHECHTER POULTRY CORP. v. UNITED STATES, 295 U. S. 495, 79 L. ed. 1570 (1935) at 547.

The petitioner respectfully submits that under the facts of the present case, respondents are clearly guilty of having violated the Sherman Act. It will be shown (1) that respondents' conspiracy *directly* affected and restrained commerce, and (2) that respondents *intended* to restrain commerce; either of which establishes a violation of the Sherman Act.

1. When Respondents Completely Stopped Petitioner's Manufacturing and Shipping Operations, Commerce Was Directly Affected and Restrained.

(A) The Stoppage of Operations of a Plant "In the Flow of Commerce" Directly Affects, Burdens and Restrains Commerce.

When respondents unlawfully seized and retained possession of the Apex plant, forcibly stopping its manufacturing operations and preventing its interstate shipment of finished merchandise, they directly affected, burdened and restrained interstate commerce. That such a stoppage has a direct and immediate effect upon commerce was unequivocally announced by this Court in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893 (1937). In that case the stoppage of operations of a single factory "in the flow of commerce"—one which received its raw materials from and shipped its finished merchandise to points outside the state (as did petitioner)—was held by this Court to have a direct and immediate effect upon commerce (rather than an indirect and remote effect as found by the Circuit Court in the present case).

Said Mr. Chief Justice Hughes, speaking for this Court (page 41):

"Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, *the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic.*" (Italics ours.)

The same principles and reasoning were held by this Court to apply in the companion case of NATIONAL LABOR RELATIONS BOARD v. FRIEDMAN-HARRY MARKS CLOTHING Co., 301 U. S. 58, 81 L. ed. 921 (1937) notwithstanding respondent's vigorous contention that the stoppage of its manufacturing and shipping operations could not be deemed to affect commerce directly because of the small size of its plant and volume of business (much smaller than that of Apex).

Thus, both Congress, in enacting the National Labor Relations Act, and this Court, in sustaining it, have recognized that under our existing economic structure the stoppage of manufacturing and shipping operations in a single plant "in the flow of commerce" directly burdens and restrains commerce.

The Circuit Court, however, concluded that the effect of the stoppage of petitioner's operations was indirect and remote and refused to follow the ruling of this Court in the JONES & LAUGHLIN and FRIEDMAN-HARRY MARKS Cases that the effect was direct, on the sole ground that the word "affect" as used in the National Labor Relations Act is broader in scope than the word "restraint" as used in the Sherman Act, saying (R. 1416):

> "Congress used a very broad word, 'affect', in the National Labor Relations Act, thus evidencing its intention to embrace the entire field of interstate commerce confided to it by the Constitution. Upon the other hand in the Sherman Act, Congress employed the word 'restraint,' which has a different and plainly more restricted connotation."

But the decisions of this Court in the JONES & LAUGHLIN and FRIEDMAN-HARRY MARKS Cases did not turn upon nor even involve the scope of the word "affect" in the National Labor Relations Act. In those cases, this Court found, as had Congress in the preamble to the National Labor Relations Act, that industrial strife caused by unfair labor practices in a manufacturing plant results in the stoppage of its operations. The issue then was *whether this stoppage of operations had a direct effect upon commerce*, for unless the effect was direct, Congress would not have the power to prohibit local practices resulting in such a stoppage. When this Court decided that issue by holding that such a stoppage did have a direct effect upon commerce, it announced a legal principle in no way confined to nor dependent on the use of the word "affect" in the National Labor Relations Act, but one which was equally applicable to the present case or to any case where that is the issue to be decided.

Respondents, however, make the further contention that the decision in the JONES & LAUGHLIN and FRIEDMAN-HARRY MARKS Cases is wholly inapplicable in deciding the present case because the question presented in this case is different. The question in those cases, it is argued, was the constitutionality of the National Labor Relations Act, whereas the question in the present case is the applicability of the Sherman Act. While the ultimate question for deci-

sion in each case is different, the issue upon which the answer to that question depends is exactly the same, namely, whether the effect upon commerce of a stoppage of operations is direct or indirect. Indeed, in the JONES & LAUGHLIN Case itself, this Court pointed out that the power of Congress to pass the National Labor Relations Act was to be determined by the same test which this Court applies in determining whether there is a restraint of commerce in violation of the Sherman Act, namely, whether the conduct involved directly affects commerce. Said this Court (page 38):

> "The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the Federal Anti-Trust Act."
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> . . . . . .
>
> "Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 S. Ct. 301, 13 Ann. Cas. 815; United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570, 27 A. L. R. 762, supra; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Asso., 274 U. S. 37, 71 L. ed. 916, 47 S. Ct. 522, 54 A. L. R. 791."

Similarly in A. L. A. SCHECHTER POULTRY CORP. v. UNITED STATES, 295 U. S. 495, 79 L. ed. 1570 (1935), this Court said (at page 546):

> "In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn

only as individual cases arise, but the distinction is clear in principle.

. . . . . .

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act."

Therefore, the holding by this Court in the JONES & LAUGHLIN and FRIEDMAN-HARRY MARKS Cases that the stoppage of operations in a single plant has a direct effect upon commerce is conclusive of that same issue in the case at bar. A direct effect upon and restraint of commerce having been caused by the unlawful acts of respondents pursuant to their conspiracy, the Sherman Act was thereby violated.

(B) EVEN APART FROM THE JONES & LAUGHLIN CASE, WHEN RESPONDENTS PREVENTED APEX FROM SHIPPING ITS FINISHED MERCHANDISE INTERSTATE, THEY DIRECTLY RESTRAINED COMMERCE.

On May 6, 1937, when respondents seized the Apex mill, the company had on hand, ready to ship, 130,117 dozen pairs of hosiery (R. 518, 519), valued at over $800,000 (R. 150, 151), 80% of which was for shipment to customers located outside of Pennsylvania (R. 522). Even if it be said in the present case that the stoppage of petitioner's manufacturing operations had but an indirect effect on commerce (notwithstanding this Court's decision in the JONES & LAUGHLIN Case that such a stoppage has a direct effect), *nevertheless when respondents wrongfully prevented the interstate shipments of the finished merchandise Apex had on hand against orders, they thereby directly restrained interstate commerce,* for this Court has said:

"So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state,

he engages in interstate commerce . . . subject . . . to regulation only by the Federal Government."

CARTER v. CARTER COAL CO., 298 U. S. 238, 80 L. ed. 1160 (1936) at page 303.

Therefore, when in the present case respondents stopped petitioner's interstate shipment of $800,000 of hosiery contracted for, they stopped and restrained petitioner's interstate commerce. In UNITED LEATHER WORKERS' v. HERRERT, 265 U. S. 457, 68 L. ed. 1104 (1924), this Court held that the illegal activities of respondents did not violate the Sherman Act, only because there was no evidence (as there was in the case at bar) of interference with the interstate shipments of goods ready to ship. Said this Court (page 463):

"There was no evidence whatever to show that complainants were obstructed by the strike or the strikers in shipping to other states the products they had ready to ship, or in their receipt of materials from other states, needed to make their goods. While the bill averred that defendants had instituted a boycott against complainants, and were prosecuting the same *by illegal methods, there was no evidence whatever that any attempt was made . . . to interfere with their interstate shipments of goods ready to ship.*" (Italics ours.)

That the prevention of interstate shipments of goods ready to ship is a restraint of commerce and a direct violation of the Sherman Act was again recognized by this Court in BEDFORD CUT STONE COMPANY v. JOURNEYMEN STONE CUTTERS' ASSN., 274 U. S. 37, 71 L. ed. 916 (1927) at page 47:

"In the United Leather Workers International Union Case, it appeared that the strikes were leveled only against production, and that the strikers (p. 471) *did nothing which in any way directly interfered with*

the interstate transportation or sales of the complainants' product:' and the decision rests upon the ground that there was an entire absence of evidence or circumstances to show that the defendants in their conspiracy to coerce complainants, were directing their scheme against interstate commerce. (Italics ours.)

. . . . . .

"In the present case, since the strikes were directed against the use of the product in other states, *with the immediate purpose and necessary effect of restraining future sales and shipments in interstate commerce*, the determinative decisions to be applied are those pointed out in the United Leather Workers International Union Case, at p. 469 . . ." (Italics ours.)

In the BEDFORD Case (as in LOEWE v. LAWLOR, 208 U. S. 274, 52 L. ed. 488 (1908) and in DUPLEX v. DEERING, 254 U. S. 443, 65 L. ed. 349 (1921)), this Court held that the acts of defendants — a secondary boycott at the point of destination of plaintiff's product — directly restrained commerce in violation of the Sherman Act. In the case of a secondary boycott, there is no physical restraint of commerce itself, but merely the passive act of boycott which eventually results in commerce being reduced. How much greater and more direct was the restraint of commerce in the present case when the physical force and plant seizure deliberately resorted to by respondents, directly prevented petitioner's interstate shipments! Surely it cannot be said that the prevention of interstate shipments by the passive act of boycott at the point of destination directly affects and restrains commerce, while the active prevention of those shipments at their point of origin through the lawless use of physical force has but an indirect and remote effect upon that commerce. Commerce is equally restrained whether that restraint is exerted at the shipment's point of origin or its

point of destination. "It is not material or important whether the restraint operates upon this interstate commerce at the point of origin or at the point where it comes to rest." AEOLIAN CO. v. FISCHER, 40 F. (2d) 189 (1930), at page 193. See also LOCAL 167, etc., v. UNITED STATES, 291 U. S. 293, 78 L. ed. 804 (1934) at 297.

Therefore, even if the Circuit Court considered the JONES & LAUGHLIN Case inapplicable, it nevertheless erred in failing to apply the doctrine laid down by this Court in the other cases hereinbefore cited, that a conspiracy which by violence and coercion prevents interstate shipments of goods ready to ship directly restrains commerce in violation of the Sherman Act.

2. The Evidence Clearly Shows and the Jury Found That Respondents Intended to Restrain Commerce.

Even apart from the question of whether respondents' conspiracy directly affected and restrained commerce, it nevertheless violated the Sherman Act since it was consummated with the intent of restraining commerce.

(A) THE JURY FOUND AS A FACT THAT RESPONDENTS INTENDED TO RESTRAIN COMMERCE.

The jury found as a fact that respondents' conspiracy was carried out with the intent of restraining commerce. At the trial, Judge Kirkpatrick had charged on this point as follows (R. 1314);

> "It is necessary in a case under the Sherman Act to show or to prove that there was an intent, on the part of the defendants who are sued, to restrain interstate commerce . . . *if you find* that the defendants did the things which they are charged with doing, then, without further proof of their intent, you *may* find from those facts that the defendants did intend to restrain interstate commerce." (Italics ours.)

After reviewing the acts with which respondents were charged, the Court further said (R. 1315):

> *"That is evidence from which, under the ruling of the Circuit Court of Appeals, you may find—I am going to leave it to you to say—but you may find that there was a restraint, an intended restraint, of interstate commerce* on the part of the persons, whoever they were, who caused the plant to close down and stop production." (Italics ours)*

The evidence which fully supported the jury's finding of respondents' intent to restrain commerce was as follows:

(a) Respondents' planned conspiracy to seize and hold possession of petitioner's plant by means of a sit-down strike, was shown by a "pledge card" distributed by the respondent union prior to the "sit-down" strike in which the signer pledged himself to join the union and "to go on a sit-down strike" at the Apex mill "to bring about full recognition of our demands and the union" (R. 229).

(b) Respondents' deliberate, violent and forceful seizure of petitioner's plant; their exclusion of Apex officers and employees (R. 313, 410, 787); and the wreckage of its plant, machinery and equipment (R. 296, 414-457), all of which was done by respondents with the intention and pur-

*While respondents may contend otherwise, there can be no doubt that in charging the jury as set forth above, the trial Judge submitted to the jury the question whether respondents intended to restrain commerce. This is further demonstrated by the fact that in his opinion denying respondents' motions to set aside the judgment and for a new trial, Judge Kirkpatrick carefully pointed out that while he could have charged the jury that intent to restrain commerce was presumed as a matter of law, "I submitted the question of defendants' intent as well—a course of which the plaintiff might have some reason to complain, but not the defendants". (R. 1390).

pose of completely stopping petitioner's manufacturing and interstate shipping operations until their demands were met.

(c) The declarations of William Leader, president of respondent union, on the day the Apex plant was invaded and seized, that the Union would hold possession of the Apex plant until its demands for a closed shop were granted (R. 223).

(d) Respondents' supplying the sit-down strikers with cots and blankets (R. 227, 228), food (R. 359) and strike pay (R. 332) to enable them to remain in complete and exclusive possession of the Apex plant and thus prevent its manufacturing operations and interstate shipments until their demands were granted.

(e) The flat refusal by the union, when requested, to permit Apex to ship the $800,000 of ordered finished hosiery on hand to its customers throughout the country; the president of the Union saying in response to such requests (R. 620):

> "War is war, and we won't let you remove one dozen pair of hosiery against any order until you give us a closed shop agreement."

The very fact that respondents carried out their conspiracy through the medium of a sit-down strike and with the stated purpose of not surrendering possession of petitioner's plant until their demands were granted (R. 184) is complete proof of their intent to restrain commerce. Such a conspiracy, by its very nature, contemplated the complete throttling of petitioner's interstate commerce. How then can it be said, as did the Circuit Court (R. 1415), that the record in this case does not support the jury's finding that respondents intended to restrain interstate commerce. In

so holding, the Circuit Court clearly erred. The jury's finding was conclusive.

Proof of an intent to restrain commerce having been shown, it is immaterial whether respondents' conspiracy is said to have directly or indirectly restrained commerce—in either case there is a violation of the Sherman Act. In the so-called "SECOND CORONADO CASE" (CORONADO COAL CO. v. UNITED MINE WORKERS, 268 U. S. 295, 69 L. ed. 963 (1925)), this Court, at page 310 said:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce*, or the price of it in interstate markets, *their action is a direct violation of the Anti-trust Act.*" [Citing cases.] (Italics ours.)

(B) EVEN IN THE ABSENCE OF THE FINDING BY THE JURY, RESPONDENTS' INTENT TO RESTRAIN COMMERCE WILL BE PRESUMED AS A MATTER OF LAW.

This Court has frequently declared, in Sherman Act cases, that the conspirators are presumed to have intended the necessary consequences of their acts and cannot be heard to say the contrary.

In UNITED STATES v. PATTEN, 226 U. S. 525, 57 L. ed. 333 (1913), persons engaged in a conspiracy which was shown to have restrained commerce, were, in legal contemplation, charged with having intended that result. Said this Court (226 U. S. at 543):

> "And that there is no allegation of a specific intent to restrain such trade or commerce does not make

against this conclusion, for, as is shown by prior decisions of this court, *the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary.* In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 243, 44 L. ed. 136, 148, 20 Sup. Ct. Rep. 96; United States v. Reading Co., 226 U. S. 324, 370, ante 243, 33 Sup. Ct. Rep. 90." (Italics ours.)

Again, in the case of NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN, supra, this Court held that an intent to restrain commerce will necessarily be inferred from proof of the direct effect of respondents' conduct upon commerce. Said this Court (page 40):

". . . when the 'intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce . . . their action is a direct violation of the Anti-Trust Act'. 268 U. S. p. 310. *And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct.* Industrial Asso. v. United States, 268 U. S. p. 81, 69 L. ed. 855, 45 S. Ct. 403." (Italics ours.)

So, in the present case, after unlawfully seizing and taking possession of the Apex plant, destroying its machinery and equipment, stopping its manufacturing and forcibly preventing its interstate shipments, thereby completely stopping and obstructing its interstate commerce, respondents cannot be heard to say that they did not intend to restrain commerce, which was the necessary consequence

of their unlawful acts, because their "purpose" was to secure a closed shop agreement. Such an intent will be presumed as a matter of law.

The Circuit Court in its opinion, however, completely disregarded the abundant proof of respondents' intent to restrain commerce, the jury's finding of that intent, and the legal presumption of that intent, as discussed heretofore, by concluding that the only "intent" of respondents' conspiracy was to obtain a closed shop. Said the Court (R. 1415):

> "The evidence in the case at bar supports but one conclusion, namely . . . that the intent and purpose of the appellants at the time of the formation of their conspiracy and thereafter was to unionize the Apex plant, not to restrain commerce or to affect prices within the industry."

But the "intent", in the sense of "purpose" or "ultimate object", of the labor union involved in every Sherman Act case heretofore decided by this Court has merely been to unionize the particular plant involved or to obtain some other union objective, rather than to restrain commerce. Nevertheless this Court has squarely held that such an ultimate object cannot justify a restraint of commerce in violation of the Sherman Act. In BEDFORD CUT STONE CO. v. JOURNEYMEN STONE CUTTERS' ASSN., 274 U. S. 37, 71 L. ed. 916 (1927) this Court, at page 47 said:

> "Respondents' chief contention is that 'their sole and only purpose . . . was to unionize the cutters and carvers of stone at the quarries'. And it may be conceded that this was the ultimate end in view.
>
> . . . . . .
>
> "A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the par-

ticipants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint.'"

Again, in INDUSTRIAL ASSOCIATION OF SAN FRANCISCO v. UNITED STATES, 268 U. S. 64, 69 L. ed. 849 (1925) in commenting on what may have been the ultimate object of the conspiracy (in the present case to obtain a closed shop agreement) as contrasted with the restraint of commerce resulting from the conspirators' unlawful actions (in the present case completely preventing petitioner's manufacturing and interstate shipments), this Court said (268 U. S. at page 77):

"Interference with interstate trade was neither desired nor intended.

. . . . . .

"The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter; namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions."

. . . . . .

"But it is not enough that the object of a combination or conspiracy be outside the purview of the act, *if the means adopted to effectuate it directly and unduly obstruct the free flow of interstate commerce.* The statute is not aimed alone at combinations and conspiracies which contemplate a restraint of interstate commerce, but includes those *which directly and unduly cause such restraint in fact.*" (Italics ours.)

To the same effect see DUPLEX PRINTING PRESS CO. v. DEERING, 254 U. S. 443, 65 L. ed. 349 (1921) at 468.

To summarize the discussion in the foregoing section of this heading "III. Respondents' Conspiracy Violated the Sherman Act":

1. Respondents' unlawful stoppage of all of petitioner's business operations directly burdened and obstructed interstate commerce in violation of the Sherman Act.

2. Especially was interstate commerce directly restrained in violation of the Sherman Act when respondents forcibly prevented petitioner from making interstate shipments of the finished merchandise on hand ready to ship.

3. Respondents' specific intent to restrain commerce having been fully proved to and found by the jury, their conspiracy violated the Sherman Act, even should the stoppage of petitioner's operations be said to have had but an indirect effect upon commerce.

4. Even if respondents' intent to restrain interstate commerce had not been proved, respondents cannot be heard to say the contrary, since they will be held to have intended the necessary consequences of their unlawful acts.

IV. THE CIRCUIT COURT ERRED IN HOLDING THAT THE SHERMAN ACT WAS NOT VIOLATED BECAUSE A LARGE PROPORTION OF THE NATIONAL VOLUME OF COMMERCE IN HOSIERY WAS NOT RESTRAINED. SUCH A TEST IS IN COMPLETE CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

Although the Circuit Court in its opinion (R. 1401, 1402) roundly denounced respondents' outrageous conspiracy, specifically charging them with violence, plant seizure, wanton destruction of property and machinery, stoppage of manufacturing operations and refusal to permit the company to remove its finished hosiery then ready for interstate shipment—with the conduct of a "sit-down strike in

its most aggravated and illegal form"—it nevertheless concluded that respondents' conspiracy did not violate the Sherman Act *because an unreasonably large proportion of the entire national volume of commerce in hosiery was not affected.* Said the Circuit Court (R. 1412):

> "Furthermore, although the appellee did a business in the manufacture and sale of full fashioned hosiery of approximately $5,000,000. a year, this was a small part of the total industry. In 1936, the annual national shipments of full fashioned hosiery were 37,400,782 dozen pairs. In 1937, the annual national shipments amounted to 39,678,494 dozen pairs. The record shows that during the last eight months of 1937, the appellee shipped 274,791 dozen pairs of stockings. Even if the appellee's output was quadrupled, it would amount to less than three percent of the total national output in the industry. The interruption of production incurred by the appellee through the acts of the appellants had small effect upon interstate commerce."

And again (R. 1416):

> "In other words, in order to come within the purview of the Sherman Act, and thus to confer jurisdiction upon the Federal courts commerce must not only be affected, but also must be restrained and restrained to an unreasonable degree."

In so holding, the Circuit Court purported to apply the so-called "rule of reason" laid down by this Court in the case of STANDARD OIL CO. v. UNITED STATES, 221 U. S. 1, 55 L. ed. 619 (1911). That the Circuit Court completely misconceived the meaning and application of this "rule of reason" is immediately obvious from an examination of the origin and purpose of that rule. The reason for its adoption was fully explained in the case of UNITED STATES v. AMERICAN TOBACCO COMPANY, 221 U. S. 106, 55 L. ed. 663

(1911), in which this Court pointed out that if every agreement, contract or business combination, which in any degree restrained commerce, were held to be a violation of the Sherman Act, legitimate business activity would be drastically curtailed and penalized. Hence a "rule of reason" was adopted. Said this court in the TOBACCO CASE (221 U. S. at 178):

> "In that case [referring to the Standard Oil Case], it was held, without departing from any previous decision of the court, that as the statute had not defined the words 'restraint of trade', it became necessary to construe those words,—a duty which could only be discharged by a resort to reason. . . . 'The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it' [Quoting from the Joint Traffic Case, 171 U. S. at 568].

The rule has never been applied by this Court in any case involving the unlawful activities of a labor union. The reason is clear. In business combination cases, the activities engaged in are *lawful and proper* activities and only become violative of the Sherman Act when they unreasonably control or restrain commerce. Because they are otherwise lawful activities, the "rule of reason" furnishes a "yardstick" for determining when these lawful activities have reached a point where they result in an unlawful restraint of commerce.

Where, however, commerce is directly restrained by acts which in themselves are flagrantly *unlawful*, as in the case at bar, such a restraint can never be considered "reasonable" and therefore not in violation of the Sherman

Act, simply because the volume of commerce restrained is but a small proportion of the national volume. This is conclusively shown by the fact that this Court has held the Sherman Act violated by the *unlawful* activities of labor unions which have restrained but a very small proportion of the national volume of commerce in the commodity involved.

Thus, in the SECOND CORONADO COAL Case, 268 U. S. 295, 69 L. ed. 963 (1925), the respondent union in its brief (page 78) strongly urged that a restraint of the production in plaintiff's mines of 5000 tons of coal a day (compared to a national production of from 10,000,000 to 15,000,000 tons of coal per week) was too insignificant to constitute a restraint of commerce in violation of the Sherman Act. Nevertheless, this Court held that the Act had been violated, although there *plaintiff's production was but one-fifth to one-third of one percent of the national production of coal.*

Similarly, in LAWLOR v. LOEWE, 235 U. S. 522, 59 L. ed. 341 (1915) this Court permitted the recovery of damages under the Sherman Act, although the evidence disclosed that plaintiff employed only 230 persons and manufactured only $400,000 worth of hats annually—an insignificant portion of the total hat production of the country.

And again, in DUPLEX PRINTING PRESS CO. v. DEERING, 254 U. S. 443, 65 L. ed. 349 (1921) this Court held the Sherman Act was violated by the activities of the defendant labor union and in that case the plaintiff's production was less than 8 percent of the total production of printing presses in the country.

That the volume of commerce restrained is not controlling is fully shown by the recent opinion of this Court in NATIONAL LABOR RELATIONS BOARD v. FAINBLATT, 306 U. S.

601, 83 L. ed. 1014 (1939) in which Mr. Justice Stone, speaking for the Court, stated (page 606):

> "Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce, be it great or small. Hanley v. Kansas City Southern Railway Co., 187 U. S. 617. The exercise of Congressional power *under the Sherman Act*, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act, has never been thought to be constitutionally restricted *because in any particular case, the volume of the commerce affected may be small.*" (Italics ours.)

In addition to the foregoing decisions of this Court, Circuit Court decisions have also uniformly rejected the contention that an unreasonable quantity of commerce must be restrained by the conspirators' unlawful acts, in order that the Sherman Act be violated. In STEERS v. UNITED STATES, 192 Fed. 1 (1911), in which defendants had *restrained the shipment of only four hogsheads of tobacco*, this contention was squarely rejected by the Circuit Court of Appeals for the Sixth Circuit, when, in its opinion, it said (page 4):

> "The first ground of demurrer was that one shipment by one shipper to another state does not amount to that interstate trade, the restraint of which is forbidden. This argument is based upon . . . the supposed holding in the recent Standard Oil and Tobacco Cases, 221 U. S. 1, 106, 31 Sup. Ct. 502, 632, 55 L. ed. 619, 663, to the effect that, in order to be covered by

this statute, the restraint of trade must be of considerable quantity; that is, of unreasonable amount."

. . . . . .

"We do not find in the Standard Oil and Tobacco Cases any holding that a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As we read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. *These opinions contain no justification for the idea that direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be permitted only because the volume of traffic affected is not very great.*" (Italics ours.)

And in answer to the same argument advanced against invoking the Sherman Act, where the defendant strikers, by force and intimidation, prevented the interstate shipment of *but a single shipment of a steel billet*, the Court, in O'Brien v. United States, 290 Fed. 185 (1923), held that:

". . . the existence of the offense is found not in the amount of commerce restrained, but in the direct and absolute character of the restraint."

And in Patterson v. United States, 222 Fed. 599 (1915), cert. den. 238 U. S. 635, 59 L. ed. 1499 (1915), the Court stated at page 619:

". . . it is immaterial what is the extent of the interstate trade or commerce conspired against. . . . There is no act of interstate trade or commerce so insignificant as not to be protected by it [the Sherman Act]."

Hence, it is clear that the Circuit Court erred in holding that because the volume of commerce restrained by respondents was small when compared with the national volume of commerce in hosiery, the restraint of commerce caused by the unlawful acts of the respondents did not violate the Sherman Act.

CONCLUSION.

On May 6, 1937, when 2,500 employees of the Apex Hosiery Company were enjoying rates of pay, hours of work and general working conditions equal to that in any other plant in the country, the respondent union determined that the Apex plant forthwith must become a closed union shop. The fact that *only 8 of the company's 2,500 employees were members of the respondent union on that date*, and that therefore neither the union nor Apex could enter into a closed shop agreement * in no way deterred the respondents. Knowing that the employees of the Apex plant had refused, almost to a man, to join their union, respondents realized that only by the illegally coercive means of a sit-down strike could their objective be attained.

Obviously, respondents knew that so long as the sit-downers held possession of petitioner's mill, 2,492 employees would be prevented from working; manufacturing and interstate shipments would be prevented; in a word, all of the interstate commerce in which Apex was engaged to

* Sections 8 (3) and 9 (a) of the National Labor Relations Act (Act of 1935, c. 372, Sec. 8 (3), 49 Stat. 452, 29 U. S. C. A. Sec. 158 (3); Sec. 9 (a), 49 Stat. 453, 29 U. S. C. A. Sec. 159 (a)) only permit a closed shop agreement *provided* the union represents a majority of the employees in the plant.

the extent of $5,000,000. per year would be stopped and petitioner would be forced to accede to their unlawful demands.

The arguments heretofore advanced by respondents to escape the liability imposed on them by the Sherman Act all stem from the single fact that the acts complained of were committed by a labor union. Respondents contend that unless labor unions are entirely exempted from the provisions of the Sherman Act, the rights of labor will be so circumscribed and impaired as to be illusory. But this contention is answered by the fact that Congress, in the Clayton Act, has granted labor immunity from the operation of the Sherman Act *so long as the means which it employs to attain its purposes are lawful and peaceful.* If now labor seeks immunity from the Sherman Act even when it resorts to violence and sabotage to accomplish its purposes, its appeal should be addressed to Congress, and not to this Court.

Petitioner respectfully submits that where, as in the present case, commerce has been burdened and restrained by a conspiracy, it is no less a violation of the Sherman Act because that restraint was caused by the conspiracy of a labor union which deemed itself above the law and committed the unlawful and reprehensible acts of violence, property seizure and destruction of which the respondents stand condemned. In the words of Mr. Chief Justice Hughes, in the FANSTEEL Case (page 253):

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society."

Wherefore, it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed, and the judgment originally entered by the District Court, in favor of the petitioner, reinstated.

Respectfully submitted,
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